

From: Walter L. Johnson
To: Renata Hesse (E-mail)
Date: 1/28/02 8:10am
Subject: DOJ v Microsoft, an end user opinion

Dear Ms. Hesse,

It is my understanding that opinions regarding the DoJ v Microsoft ruling is allowed and welcomed by your office. I have attached such a document that states what perceive and believe in the matter.

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The agreement between Microsoft and the Department of Justice, An opinion

By Walter L. Johnson

While the subject, action has been concluded with what has been perceived as less than a satisfactory agreement, there are extended implications for which we must prepare. If you want to cut to the chase, see "Some final words" at the end of this opinion.

The allegations filed against Microsoft by the Department of Justice at the outset has the appearances of a cut and dried case of unfair practices involving free and open competition. The ruling therefore had all the appearance and intent of limiting unfair competition. We must conclude that there was sufficient evidence against Microsoft to create a ruling. On closer examination, the ruling is not as straightforward as it should be, that is if Microsoft was so clearly at fault. Specifically, there are certain portions of the settlement that clearly limit Microsoft's competitive ability and others allow it to continue to compete. Moreover, other portions of the settlement allow Microsoft to continue to pursue its larger strategy without the hindrances that the litigants were seeking. It is this enigmatic judgment that needs examination. This examination is not for the purposes of a retrial but for an understanding, because the end user could once again reap the benefits as could the litigants.

Microsoft:

To say that Microsoft has brought desktop computing, PC style, into the mainstream would be an understatement. MS took the next software development step immediately after general PC hardware was made commercially possible. Had not MS done this, desktop computing could still be limited to offices. And most probably that would have been due to prohibitive costs. Microsoft has stated all along that its goal was to spread computing through society as a whole and link it via a network. To achieve this goal it supplied an operating system, graphic user interface and application software. It bundled software, made special offers, collected partners and bought companies.

If this is, in general, a fair assessment of Microsoft's intent, actions, and strategy, then an examination of how it achieved it's goals through what has been characterized as "questionable tactics", are in order. And this includes the resulting judgment by the DoJ.

* A previous analysis has been completed by "ACT Analysis of Microsoft/DOJ Proposed Settlement", 1413 K Street, NW, 12th Floor, Washington, DC 20005, www.ACTonline.org. I have used it's 6 headers to lend structure to my comments as I believe they tip the ice burg.

***1." For computer manufacturers (OEMs) who equip their products with any Microsoft operating system—Guaranteed flexibility."**

Microsoft has been ordered to modularize it's OS, GUI and middleware to allow OEMs to remove "pieces and parts" at will and "mix and match" other OEM products and to have the freedom to control the boot sequence of the OS. Additionally, uniform-licensing terms, discounts, and marketing freedom are ordered. Microsoft could have modularized their product earlier and competed "piece at a time" but they chose to integrate so that the product could function easier and quicker. Remember hardware at the time of these alleged offences were slow and quirky. Sometimes Windows worked well only for a particular platform or hardware configuration. MS dealt with several clone producers to enable their product to operate on the hardware platform. It was a custom fit in many cases made by MS and the clone producer before it arrived at the client. While MS was fighting the OS/Hardware infrastructure problem, it appears likely that ease of inclusion and exclusion was not a feature high on their list. It seems that there were two problems that existed for MS, hardware and application fit. MS chose the easy route, which excluded competitors. MS was not obligated to assist its competitors in undermining itself.

The Department of Justice has ordered Microsoft to make it's OS a highly modularized piece of software. This means that if a competitor, for example, wants a different browser to be integrated into lets say Windows XP and that the resulting product could be licensed as a VAP called "Windows XP Rouser Browser." The competitor will pay Microsoft a volume rate for their basic "Windows XP" modular without the Windows browser. If their resulting product is a contender to Microsoft's, then as they say, " we've got a horse race." Finally, Microsoft will not create any damaging strategy and or tactic regarding this portion of the judgment that may be considered a conscience effort to harm or hinder their competitor.

The competitor may integrate any middleware software of their choice that previously WAS an integral part of the Microsoft OS including controlling the boot up sequence.

A modular, accessible core is made available which allows anyone the ability to plug their component into the core or just eliminate that component functionality. Additionally, remember that MS piece of middleware that is not used? It may be integrated into their competitors OS. If MS is listening, their components may become more valuable separately. Who is the winner? Will the costs rise? If you recall, it was Netscape that took offence when MS bundled their own Internet explorer with Windows. Netscape said unfair competitive practices. Who lost? Netscape! Who won? The end user won and that reinforced MS and their bundling practice. Modularizing may be the smartest thing that the DoJ did for the public and Microsoft. Moreover, it will make MS and it's competitors very interested in turning out better products. The end result is that if all the competitors play by the rules, then all will win. If Microsoft was all that good at producing products before then they will prove it again by producing an even better product in the future. Additionally, the competition will be given the opportunity to do the same.

***2."For all information technology (IT) providers, including Microsoft's competitors—Guaranteed access to technical specifications."**

MS must now give up what ever information it has that enables machines running the Windows OS to communicate with MS servers. This may not include MS's middleware code but How it interfaces with their servers. This means that another software producer now has all of the protocol specifics to create a specialized product for communications purposes or something to think about regarding a run around with their systems. In other words MS's competitors have some more advantage. It is the "modularization and cooking instruction" for networking within MS Client and server products that the DoJ has delivered. Of course MS must license ANY intellectual property rights to encourage middleware production by it's competitors. The final part of this part of the settlement is that MS may not penalize it's competitors.

Once again, this is a double-edged sword. Does any company really want to have a stand up fight with Microsoft? Most competitors will say yes, if it's a fair fight. And now, there are certain areas that are very level and fair but even at this, MS has an advantage. MS is big and has learned to mobilize a development effort into a formidable force. It was seldom a deadline to compete with competitors but to keep public promises that motivated MS to excel. I believe that Microsoft's brand of internal talent motivation is "carrot and stick." When you give a gifted group a challenge in an arena of their own, they will work themselves beyond reason. In the new "competitive product" arena, the talent will need more than the "C and S" motivation. It is possible that the companies that precipitated the litigation wanted a fair fight. BUT, most probably, they wanted a breakup of Microsoft. That would have tied one hand behind MS and given the competition an advantage. This way once MS restructures and provides sensitivity training, they will continue. But it can never continue as usual, this will be an all out fight if anyone wants to gain a clear victory. I believe that Microsoft is in the lead as before. However, with the new rules, old incentives have been re-exposed to more players. How they will get there is fuzzy. Moreover, Microsoft is unclear how they will improve their modularized product to remain within the judgment and be superior. Products being self contained yet accessible to broad use is good for the competition and may be even better for Microsoft.

If MS must modularize then so must its competition. Modularization with flexible interfaces that are tight, compact, unbreakable, self-repairing, self-resetting modules. This has a lot of potential

because individual mods may be very narrow task orientated or broad and intuitive in purpose. Put your system together and have it very focused and directed. This part of your system is manufactured by MS and that by AOL Time Warner, or Sun, etc. This year MS has the best browser, next year Sun. Plug it in or pull it out and put in another module by another manufacture. The manufactures of the products you buy will strive to improve their products and it will make them stronger and smarter. Everybody wins.

***3." For end users—Guaranteed flexibility. "**

It's simple, full capability for the end user to mix and match or change it's mind. If they want to reverse a decision to use this module, remove it and replace it with another, with on horrendous results. This makes evaluation of products that claim to be superior easier. Sales can persuade but performance will confirm.

Niche products may completely take over a middle ground for dedicated groups of users. A product may rise to the surface as the clear winner. Whichever the case, each module that has been defined as middleware or that has been declared as a self-contained product in it's own right will become a product in its own right. The end user can customize their desktop computer to their taste and purpose. And of course each individual product, module, will have its own price tag. Buying an operating system piecemeal could become difficult but I suspect that Microsoft will publish instructions. Its competitors will complain, MS will explain and in most cases the chess game will continue. Remember, the end user reaps the result.

***4. "For those who doubt Microsoft would comply with the settlement agreement— An unprecedented enforcement mechanism. "**

The settlement has caused Microsoft to provide at their cost, a mechanism that allows resources, access, and authority to complain. If a competitor thinks that Microsoft is acting outside the agreement then it may file a fast acting complaint. This mechanism for complaint has been created in the form of an autonomous committee, technical committee, TC. It can get bigger or smaller as is needed, its own judgment, to provide for the examination due to complaints.

I am not sure if it allows for examination of releases or new products. The delaying tactics that will most likely be practiced by the competition will put the TC in constant conflict. However, this will not be forever. And, if MS keeps it's nose clean and learns to play the game, the TC will be a minor inconvenience. It is quite possible that a stamp of approval from the TC will bolster MS's public image. The TC had better know it's stuff, otherwise the jailor may be held it contention. Maybe the TC will be disputed by those it was formed to protect.

***5. "For AOL Time Warner, Oracle, and Sun— Opportunities to hinder Microsoft by abusing the settlement agreement."**

AOL Time Warner(Netscape), Oracle and Sun has been given the opportunity to observe a hand slap instead of an execution. This has caused the three protagonists much worry because they thought a breakup would deliver them the market unfettered for a considerable length of time. Now they are forced to face a giant that has been caused to kneel in repentance. Not the executed they expected.

That giant will be rising soon to its considerable height and that is a formidable sight. You can forget about the states that sued, they were in it for the money not justice and MS fowled that by offering public education an arm's length gift. Yes, it will expose education to Microsoft's products but later a modularized product. There are many who would like cash offering by Microsoft but that was not decreed by the DoJ. It appears that Microsoft has exceeded the spirit and intent of the judgment in a positive way. Remember if Microsoft's products are inferior, it will be proven to a wider audience, and if Education chooses to supplant a module for another so be it that is fair. The politicians have enough of our money, which they deny education. This could be an immediate break for education. It would appear that for a giant Microsoft has a gentle side.

Some final words:

To the point, Was Microsoft seen to be so far in the distance that it was no longer a race for first place but a question of a race at all? If this was such a race, how did Microsoft get so far ahead? There has been much exposed over the years about Microsoft's phenomenal rise to the top of the heap, It's rise to power was not being hidden but it was revealed in detail during the trial. Moreover, that may be why Microsoft received something akin to a hand slap rather than a public beheading.

IBM helped. IBM allowed Microsoft to keep the rights to the original microcomputer operating system that it had developed. This was after Microsoft had developed an operating system for IBM's new desktop hardware platform in the very early eighties. Microsoft decided to improve their version and license it on mass-produced personal computers. If and when PCs took hold.

All it took was the non-biological cloning of the PC, "PC clone," and the rest is history. There was one fee charged for each Microsoft Operating System that each PC clone received. That event was the base of revenue that allowed Microsoft to improve their operating system and pass the competition. Later they decided to market applications. The applications were not the best in the beginning but they improved until they were the standard. The Internet was becoming a reality so they started to work with it. However, that was just before they started bundling and bundling gave them an edge. While there were organizations vending a word processor or a spreadsheet or communications package (pre internet) as a separate product, Microsoft vended a suite of applications with some loose ties to each other. Later Microsoft developed an operating system with a graphic user interface towards the mid nineties. And just a little bit later in the mid nineties, the commercial internet became a reality and with it MS released an internet explorer, bundled with their new operation system. This takes us to 1995. It is this period, probably 1988 to 1998, that Microsoft's competitors lost ground, and intense infighting took place.

That was a short history lesson without the super specifics that are needed by a judicial system. Most probably, Microsoft developed certain technical internal quirks that leaned towards locking competition out of using their products. However, partnerships could be developed with the competition, with Microsoft in the drivers seat. Further, the Microsoft non-tech negotiators and executives probably started to take over the dealing 100% rather than allowing the techs to help. The non-tech Microsoft negotiators dealt for some greater advantages. This caused their competitors to finally decide that there was enough evidence to sue Microsoft for unfair competitive. You will note that I have not included details much less generalizations about any other company except Microsoft. Now may be the time to include my opinion. During the trial, charges were supported by specific details that were answered by Microsoft. The trouble is that the other companies were performing many of the practices in question as well. A wash. However, the charges that were difficult to defend was aggressive correspondence and proposed partner agreements that were clearly in favor of Microsoft. There is not one of us that hasn't attended a "Kick ass" meeting causing us to compete more aggressively but the meeting speakers didn't say "catch your opponent bent over and strike their posterior with your foot". To access the judgment, one would have to say that the DoJ did not find enough evidence to support all of the antagonist claims but found evidence that the computer industry may be too complicated to control with today's laws.

When peacetime competition is declared, those who choose to participate do so voluntarily. They do this in the belief that they know the game and that it will be conducted in a fair and bounded manor. As we have all seen, most games mature and change as the skill level and nature of the competitors change. The change is a natural result of maturation, because we want and in fact need to improve. However, when competition is performed outside the bounds of the game, the violator of the rules, unless penalized, will win. It is fairness that is at stake and the belief that it is the cornerstone of justice. The People, Department of Justice, and all the litigants want fairness. I believe that It is in this spirit that a judgment was delivered that is more a warning than a penalty to all who would participate in the game.